IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
June 4, 2007 Session

LAURA L. AUDIFFRED v. JEFFREY S. WERTZ

Appeal from the Chancery Court for Williamson County
No. 31743 Russ Heldman, Chancellor

No. M2006-01877-COA-R3-CV - Filed July 19, 2007

The husband appeals every aspect of the trial court's ruling in a divorce and custody action. The trial court designated the wife as the primary residential parent and gave the husband limited visitation time with the children. The court awarded the wife alimony and attorneys' fees and meticulously divided the parties' marital property. The husband contends he should be the primary residential parent, or in the alternative should be allowed greater visitation time with the children. He further contends that the awards of alimony and attorneys' fees were excessive and that the distribution of the marital estate was inequitable. We find no error with the numerous decisions of the trial court with the exception of one aspect of the parenting plan, that being that the husband is deprived of visitation for eleven straight days every two week visitation cycle. Thus, we modify the permanent parenting plan to afford him a more customary visitation every week and affirm the trial court in all other respects.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed in Part and Modified in Part

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and PATRICIA J. COTTRELL, J., joined.

Jon S. Jablonski, Nashville, Tennessee, for the appellant, Jeffrey S. Wertz.

Virginia Lee Story, Franklin, Tennessee, for the appellee, Laura W. Audiffred.

OPINION

Laura Audiffred, Wife, and Jeffrey Wertz, Husband, married in August 1995, after meeting at a hospital in Grand Rapids, Michigan, where she worked as an emergency room nurse and he sold medical supplies. This was her second marriage, and she had two children, Matthew and Kerri, from her previous marriage, of whom she had custody. The union of Husband and Wife produced two children, Zachary and Bailey.

The parties resided in Michigan for five years. Thereafter, they moved to Tennessee when he was transferred. Husband made over $300,000 per year marketing and selling spinal implants. His income enabled Wife to stay home and care for the four children.

Both parents were active in the lives of all the children, each of whom participated in athletics and various extracurricular activities, and the parties supported the children in all of these endeavors. Husband, Wife and the four children traveled extensively and often. They took the children on approximately twenty-six different trips during the ten years of marriage, some of which were elaborate.

Regrettably, the parties' relationship began to deteriorate as Matthew and Kerri entered their teenage years, with the parents often disagreeing on matters concerning discipline of the children. Despite these increasing tensions over how to parent the children, the parties celebrated their tenth anniversary with a second honeymoon in June 2005. Their relationship, however, quickly deteriorated thereafter.

Wife filed for divorce on August 3, 2005. Husband answered and filed a Counter-Complaint on September 27, 2005, to which Wife responded. Neither party attached a proposed parenting plan to any of their pleadings.

Wife filed a Motion for Temporary Parenting Plan and Pendente Lite Support on October 7, 2005, and the Chancellor entered a Pendente Lite and Temporary Parenting Plan on November 15, 2005, which established a temporary parenting schedule and required Husband to pay household expenses and tender $1,500 per month to Wife as support payments. While the Pendente Lite Order was in effect, Husband filed motions to have the Pendente Lite order modified and to request additional parenting time. Wife also filed a Motion for Real Estate Appraisal on Lake Home. The Chancellor addressed these various motions in one order, wherein he held that a decision on Husband's request for additional parenting time would be reserved pending other orders, Wife's motion to have the lake home appraised was granted, and the court appointed a mediator.

The parties made an unsuccessful attempt to mediate a settlement, and the Chancellor conducted a hearing in the divorce action over a span of five days in February and March of 2006. The Chancellor entered an Order on March 29, 2006, in which Wife was designated as the primary residential parent with sole decision-making authority for the parties' two minor children, and Husband was ordered to pay child support. Husband was awarded visitation with the parties' two children Thursday through Sunday every other week. He was also awarded twenty uninterrupted days over the summer. Pursuant to this parenting arrangement, Wife would have the children 253 days of the year, and Husband would have them 112 days. Wife was awarded $24,550 for her attorneys' fees as alimony in solido. The Chancellor reserved ruling concerning the property division.

On March 28, 2006, Husband filed a Motion to Accept Contract for the sale of the parties' marital residence, which was denied. Thereafter, the Chancellor set a hearing date of Aril 26, 2006,

for all remaining claims, including the sale of the parties' realty. Following the hearing, the Chancellor entered a Final Decree on May 2, 2006, in which the Chancellor meticulously divided the parties' marital estate. The Chancellor awarded Wife 60% and Husband 40% of the value of the real property. Wife was awarded the 2004 Mini Cooper and the 2002 Infiniti. Husband was awarded the 2001 Chevy Suburban, the 2000 BMW, the 1997 Chevy Conversion Van, and the Predators hockey tickets. Wife was additionally awarded transitional alimony for six years.

Following the entry of the Final Decree, Wife filed a Motion to Alter or Amend on May 9, 2006, in which she contested various aspects of the property settlement and requested that she be awarded a portion of the parties' American Express points as well as an additional monetary sum to reimburse her for unauthorized business expenses that Husband allegedly placed on the home equity line of credit. Husband responded and filed his own Motion to Alter or Amend seeking to have the divorce awarded to him, seeking to have the personal property and real property divided differently, seeking to have the graduated alimony reduced, and seeking to be relieved of the order to pay Wife's attorneys' fees. Thereafter, the Chancellor, by Order dated May 18, 2006, acknowledged that there were still outstanding property disputes between these parties and appointed a mediator to try to resolve these continuing issues. The mediator was unsuccessful and the parties thus returned to the Chancellor.

The Chancellor conducted a hearing on July 18, 2006, concerning each party's Motion to Alter or Amend, following which the Chancellor granted Wife's Motion and denied Husband's in an Order entered August 2, 2006. Pursuant to this Order, Wife received one-half of the parties' American Express points, a judgment in the amount of $9,618.44 to cover business expenses Husband placed on the home equity line of credit, and various items of personal property that were at the parties' lake house including a stereo, big screen television, pots, and pans. Husband appealed from this Order and the March 29, 2006, and May 2, 2006, Orders.

CUSTODY AND VISITATION

Husband appeals numerous issues concerning the parenting plan; however, his most ardent contention pertains to the parenting schedule wherein Wife has the children 253 days per year compared to Husband who has them 112 days of the year. He argues that time with both parents is important, and this arrangement is not in the best interests of the children and is not supported by the evidence.

This Court reviews custody and visitation decisions *de novo* with a presumption that the trial court's findings of fact are correct unless the evidence preponderates otherwise. *Kendrick v. Shoemake*, 90 S.W.3d 566, 569 (Tenn. 2002); *Nichols v. Nichols,* 792 S.W.2d 713, 716 (Tenn.1990). Moreover, appellate courts are reluctant to second-guess a trial court's determination regarding custody and visitation. *Parker v. Parker*, 986 S.W.2d 557, 563 (Tenn. 1999). This is because of the broad discretion given trial courts in matters of child custody, visitation and related issues. *Id.*; *see also Nelson v. Nelson*, 66 S.W.3d 896, 901 (Tenn. Ct. App. 2001). Custody decisions often hinge on subtle factors, such as the parents' demeanor and credibility during the proceedings. *Adelsperger*

v. Adelsperger, 970 S.W.2d 482, 485 (Tenn. Ct. App. 1997). Accordingly, trial courts have broad discretion to fashion custody and visitation arrangements that best suit the unique circumstances of each case. *Parker*, 986 S.W.2d at 563.

Furthermore, it is not the role of the appellate courts to "tweak" parenting plans with the hope of achieving a more reasonable result. *Eldridge v. Eldridge*, 42 S.W.3d 82, 88 (Tenn. 2001). This is particularly true when no error is evident from the record. *Id*. Thus, a trial court's decision regarding custody or visitation will be set aside only when it "falls outside the spectrum of rulings that might reasonably result from an application of the correct legal standards to the evidence found in the record." *Id*.

We find it significant that the trial court made no findings that Husband was in any way unfit as a parent or unable to care for the children on a more frequent basis. Moreover, the transcript of the evidence does not indicate any concerns with Husband's parenting skills. Further, the record contains evidence that Husband wanted to have more time with the children, and Husband's employer testified that he could be flexible with Husband's work schedule to allow Husband more time with them. In fact, the trial court commented that this was a close case as it pertained to parenting time. The trial court's decision as to visitation, however, is not consistent with the court's statements.

Having examined the record in its entirety, we find no justification for a parenting plan that separates Husband from the children for eleven straight days every two weeks of the year. To the contrary, we have concluded it is not in the children's best interests to be separated from their father for eleven straight days every two weeks. We, therefore, modify the parenting plan to afford Husband one additional day of parenting time every two weeks, to be scheduled during the week he formerly was without the children, in order to shorten the period of separation.

To accomplish this modification of the parenting plan, we remand this issue to the trial court with instructions to designate a day of the week during the alternate week, the week Husband was deprived of visitation under the parenting plan, so that the children will reside with their father overnight on that evening of every other week.

ALIMONY

Husband does not dispute that alimony is appropriate in this case; however, he contends it should be reduced to two years rather than the six years. Pursuant to the Order, Wife will receive $3,500 per month for the first twelve months, $3,000 for the next twelve months, and $2,000 per month for the next forty-eight months.

There are no hard and fast rules for spousal support decisions. *Anderton v. Anderton*, 988 S.W.2d 675, 682-683 (Tenn. Ct. App. 1998); *Crain v. Crain*, 925 S.W.2d 232, 233 (Tenn. Ct. App. 1996). Alimony decisions require a careful balancing of the factors in Tenn.Code Ann. § 36-5-101(d)(1) and typically hinge on the unique facts and circumstances of the case. *See Anderton*,

988 S.W.2d at 683; *see also Hawkins v. Hawkins*, 883 S.W.2d 622, 625 (Tenn. Ct. App. 1994). The two most important factors are the need of the disadvantaged spouse and the obligor's ability to pay. *Varley v. Varley*, 934 S.W.2d 659, 668 (Tenn. Ct. App. 1996).

Trial courts have broad discretion to determine whether spousal support is needed and, if so, the nature, amount, and duration of support. *See Garfinkel v. Garfinkel*, 945 S.W.2d 744, 748 (Tenn. Ct. App. 1996). Therefore, appellate courts are disinclined to second-guess a trial court's decision regarding spousal support unless it is not supported by the evidence or is contrary to public policy. *Brown v. Brown*, 913 S.W.2d 163, 169 (Tenn. Ct. App. 1994).

Husband takes issue with the fact that Wife, who has chosen to go back to work, has elected to work thirty-two hours per week rather than forty hours per week. Wife was making $27.41 per hour at the time of trial, and thus, Husband contends she could make an additional $11,440 per year if she worked full time instead of thirty-two hours per week. Husband also points out that Wife is receiving child support in addition to the alimony, and thus the amount of alimony is too much.

The record firmly establishes the fact that Wife is the economically disadvantaged spouse, has a need for support, and Husband undeniably has the ability to pay. Although Wife could work more hours, she has the primary responsibility care for the parties' children. The General Assembly has expressed a clear intent that a spouse who is economically disadvantaged, relative to the other spouse, should be rehabilitated whenever possible by the granting of an order for payment of rehabilitative, temporary support and maintenance. *Burlew v. Burlew*, 40 S.W.3d 465, 470 (Tenn. 2001). This record supports a grant of rehabilitative support and we are unable to conclude that the trial court erred by granting alimony on a graduated scale for a period of six years.

PROPERTY DIVISION

Husband contends the trial court erred in the distribution of the parties' real and personal property. With respect to the real property, the trial court disbursed the proceeds from the sale of the realty such that Wife received 60% and Husband received 40%. With respect to the personal property, Husband disagrees with the trial court's meticulous division of substantially everything, even the CD collection, pots, pans, lamps, and tables. We find no error with the division of the marital property, real or personal.

The division of the parties' marital estate begins with the classification of the property as separate or marital property. *Miller v. Miller*, 81 S.W.3d 771, 775 (Tenn. Ct. App. 2001). Tennessee is a "dual property" state, *Smith v. Smith*, 93 S.W.3d 871, 875-76 (Tenn. Ct. App. 2002), thus, it cannot be included in the marital estate unless it is "marital property." The definition of that term is found in Tenn. Code Ann. § 36-4-121(b)(1)(A). "Separate property," as that term is defined in Tenn. Code Ann. § 36-4-121(b)(2), is not marital property. Therefore, separate property should not be included in the marital estate. *Woods v. Woods*, No. M2002-01736-COA-R3-CV, 2005 WL 1651787, at *3 (Tenn. Ct. App. July 12, 2005). Property classification is a question of fact. *Mitts*

v. Mitts, 39 S.W.3d 142, 144-45 (Tenn. Ct. App. 2000). Thus, we review the trial court's classification using the familiar standard of review in Tenn. R. App. P. 13(d).

Once property has been classified as marital property, the court should place a reasonable value on property that is subject to division. *Edmisten v. Edmisten*, No. M2001-00081-COA-R3-CV, 2003 WL 21077990, at *11 (Tenn. Ct. App. May 13, 2003). The parties have the burden to provide competent valuation evidence. *Kinard v. Kinard*, 986 S.W.2d 220, 231 (Tenn. Ct. App. 1998). When valuation evidence is conflicting, the court may place a value on the property that is within the range of the values presented. *Watters v. Watters*, 959 S.W.2d 585, 589 (Tenn. Ct. App. 1997). Decisions regarding the value of marital property are questions of fact, *Kinard*, 986 S.W.2d at 231; thus, they are not second-guessed on appeal unless they are not supported by a preponderance of the evidence. *Smith*, 93 S.W.3d at 875.

After the marital property has been valued, the trial court is to divide the marital property in an equitable manner. Tenn. Code Ann. § 36-4-121(a)(1); *Miller*, 81 S.W.3d at 775. A division of marital property in an equitable manner does not require that the property be divided equally. *Robertson v. Robertson*, 76 S.W.3d 337, 341 (Tenn. 2002). Dividing a marital estate is not a mechanical process but rather is guided by considering the factors in Tenn. Code Ann. § 36-4-121(c). *Kinard*, 986 S.W.2d at 230. Trial courts have wide latitude in fashioning an equitable division of marital property, *Fisher v. Fisher*, 648 S.W.2d 244, 246 (Tenn. 1983) and this court accords great weight to the trial court's division of marital property. *Wilson v. Moore*, 929 S.W.2d 367, 372 (Tenn. Ct. App. 1996). Thus, we defer to the trial court's division of the marital estate unless it is inconsistent with the factors in Tenn. Code Ann. § 36-4-121(c) or is not supported by a preponderance of the evidence. *Brown,* 913 S.W.2d at 168.

In making an equitable division of marital property, the court shall consider all relevant factors including:

> (1) The duration of the marriage;
> (2) The age, physical and mental health, vocational skills, employability, earning capacity, estate, financial liabilities and financial needs of each of the parties;
> (3) The tangible or intangible contribution by one (1) party to the education, training or increased earning power of the other party;
> (4) The relative ability of each party for future acquisitions of capital assets and income;
> (5) The contribution of each party to the acquisition, preservation, appreciation, depreciation or dissipation of the marital or separate property, including the contribution of a party to the marriage as homemaker, wage earner or parent, with the contribution of a party as homemaker or wage earner to be given the same weight if each party has fulfilled its role;
> (6) The value of the separate property of each party;

> (7) The estate of each party at the time of the marriage;
> (8) The economic circumstances of each party at the time the division of property is to become effective;
> (9) The tax consequences to each party, costs associated with the reasonably foreseeable sale of the asset, and other reasonably foreseeable expenses associated with the asset;
> (10) The amount of social security benefits available to each spouse; and
> (11) Such other factors as are necessary to consider the equities between the parties.

Tenn. Code Ann. § 36-4-121(c).

Considering the statutory factors we believe relevant, including the age, earning capacity, and estate of the parties; the relative ability of the parties for future acquisitions of capital assets and income; the economic circumstances of each party at the time the division of property became effective, we are unable to conclude that the trial court's distribution of the marital estate was inequitable.

MISCELLANEOUS EXPENSES

Husband contends the trial court erred by awarding Wife $9,618.44 for business expenses Husband placed on the home equity line of credit, and $2,500 she incurred while staying at a hotel pending the divorce. He also complains about being ordered to reimburse $3,000 for the expense he incurred for hockey tickets. Having reviewed the record, we find no basis upon which to conclude the trial court erred in regard to these matters.

WIFE'S ATTORNEYS' FEES

Husband argues that Wife received a sufficient share of the marital estate to pay for her own attorneys' fees and that the trial court erred in requiring him to pay them. He contends an award of attorneys' fees is only appropriate "when the spouse seeking them lacks sufficient funds to pay his or her own legal expenses." *Brown,* 913 S.W.2d at 170 (citing *Houghland v. Houghland*, 844 S.W.2d 619, 623 (Tenn. Ct. App. 1992); *Ingram v. Ingram*, 721 S.W.2d 262, 264 (Tenn. Ct. App. 1986)).

An award of attorney fees constitutes alimony in solido. *Koja v. Koja*, 42 S.W.3d 94, 98 (Tenn. Ct. App. 2000) (citing *Herrera v. Herrera*, 944 S.W.2d 379, 390 (Tenn. Ct. App.1996); *Cranford v. Cranford*, 772 S.W.2d 48, 52 (Tenn. Ct. App. 1989)). "The decision whether or not to award attorneys fees is within the sound discretion of the trial court and 'will not be disturbed upon appeal unless the evidence preponderates against such a decision.'" *Koja*, 42 S.W.3d at 98 (citing *Kincaid v. Kincaid*, 912 S.W.2d 140, 144 (Tenn. Ct. App. 1995); Tenn. R. App. P. 13(d)). Where a party has been awarded funds for maintenance and support in order to provide the party with a source of income, "the party need not be required to pay legal expenses by using assets that will

provide for future income." *Batson v. Batson*, 769 S.W.2d 849, 862 (Tenn. Ct. App. 1988).

In this case, given the remarkable disparity between the parties' incomes and the fact that Wife's income will never equal Husband's, we find the Chancery court did not abuse its discretion in the award of attorneys' fees.

IN CONCLUSION

We modify the Parenting Plan to afford Husband one additional day with the children every other week, affirm the trial court in all other respects, and remand with instructions to modify the Permanent Parenting Plan in accordance with this opinion.

Costs of appeal are assessed against both parties equally.

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FRANK G. CLEMENT, JR., JUDGE